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ROUNDTABLE

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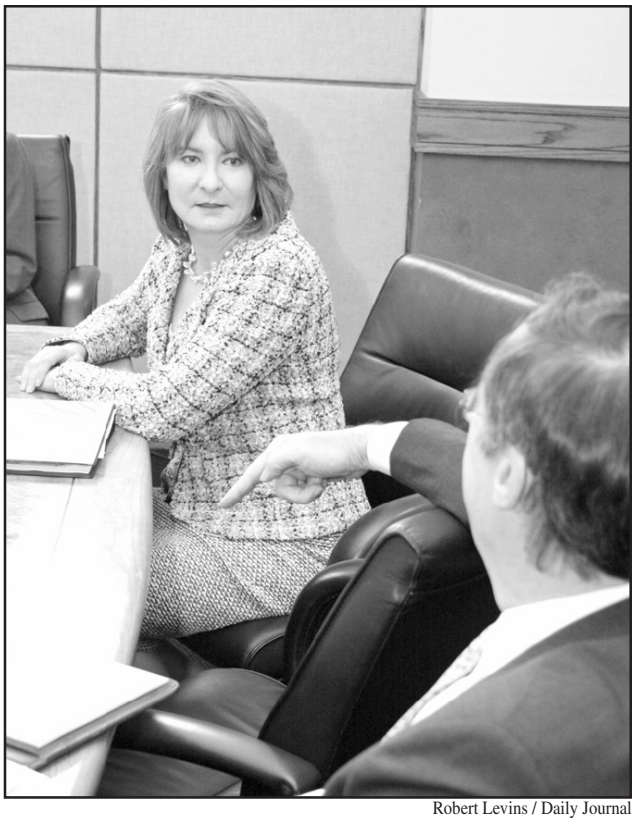
Appellate Lawyers' Roundtable

Two groups of California appellate lawyers — one in Los Angeles, the other in San Francisco — recently sat down with Daily Journal staff writer Robert Iafolla to discuss the U.S. Supreme Court and some of the upcoming cases that could impact California, including MediCal reimbursement rates, the Federal Communication Commission's ban on "fleeting expletives" and the government's right to place a GPS tracking device on a car without a warrant. Here is an edited transcript of what they had to say:



Robert Levins / Daily Journal

M.C. Sungalla of Snell & Wilmer LLP and Rex Heinke.

Daily Journal: For the first time since 2008, the Supreme Court is starting the new term with the same lineup of justices as the previous one, and it's likely that the current group will stay the same for the foreseeable future. Were there any patterns, trends or dynamics on this court emerging last term that you can see continuing?

Rex Heinke: It seems to me we still have Justice [Anthony M.] Kennedy being the swing vote on the close, ideological sorts of cases, and I don't see that changing.

Jeremy Rosen: I also think what will be more pronounced in the next term is Justice [Elena] Kagan's emergence as the leader of the liberal wing. I think she showed in two incredibly well done dissents that she would go toe-to-toe with the five more conservative justices in a way that I don't think justices on the more liberal side have done. I think she truly is replacing Justice [John Paul] Stevens. With a full docket of cases, that will be even more pronounced.

Raymond Cardozo: There's a lot of talk about Justice [Clarence] Thomas' growing influence on the court.

Rita Gunasekaran: That's interesting and kind of scary to me because I'm seeing opinions written by Thomas that I thought were way out there at one time, and now the court is gradually moving closer and closer to what he said in his dissents — dissents all by himself. They're well researched and well analyzed, but my friends and I disregarded them because they didn't comport with our notions of justice. But that's where the court is swinging.

M. C. Sungaila: There are other themes too, that mirror the political debate. Who has the power to do what and when? What's the sphere of influence of the different branches of government and the different courts, with state versus federal? There's a lot of preemption cases. Going back very fundamentally to Article III standing — can Congress tell courts when you can sue, or is it really the Constitution and what the courts say about that? There's some very fundamental questions about the relationships between different branches of government and the different levels of government that you see playing out in the courts.

DJ: The very first case scheduled for oral argument when the term opens has serious implications for California, with Gov. Jerry Brown trying to move forward with his plan to cut Medi-Cal reimbursement rates. In ***Douglas v. Independent Living Center of Southern California*****, 09-958 — which is consolidated together with two other cases — the court will consider whether Medicaid beneficiaries and providers can bring preemption challenges to such cuts under the Supremacy Clause by claiming insufficient state reimbursements threaten access to health care.**

Rosen: I was just struck by the interesting mix of strange bedfellows filing amicus briefs, where you have the Chamber of Commerce, ACLU, MalDef [Mexican American Legal Defense and Educational

Fund] and NAACP wanting aggressive abilities to have private causes of action under the Supremacy Clause, and the Obama administration saying no. But even more interestingly, the Democratic leadership in Congress — [House Minority Leader Nancy] Pelosi, [Senate Majority Leader Harry] Reid, [Rep. Henry] Waxman and others — saying they want the ability to have these private causes of action.

Heinke: Up until now, the courts have clearly said there's no 1983 claims [brought under 42 U.S.C. § 1983 for alleged deprivation of Constitutional or statutory rights by state or local governments], so you can't use 1983 to get into court. But the Supreme Court itself, admittedly without examining the issue, has repeatedly allowed Supremacy Clause causes of action that are not based on 1983 or anything else — they're like a *Bivens* claim [*Bivens v. Six Unknown* Named Agents, 403 U.S. 388 (1971)], brought directly under the Constitution. It would be a big change if they just walk away from all those decisions.

Stacy Leyton: We're counsel in the case representing one of the many Medicaid providers. This case is very much like cases that have been around for a hundred years, where a litigant is coming into court and saying, "I've been injured by a state law, the state law is preempted, I'm strictly seeking injunctive relief so the state law can no longer be implemented." And I think that is the key — this is an action seeking an injunction only, because the tests to see if you have a statutory action under 1983 have really been in the context of people seeking a damages remedy. Courts have been much more reluctant to imply a cause of action in that circumstance. But here, if you treat the Supremacy Clause like any other constitutional provision, it has long been the case that litigants can get into courts to enforce the Constitution. There's strong historical support for the notion that these actions have long existed and the founders assumed people could get into court in this way.

Kristin Myles: I could see some members of the court drawing a line in this case to say that this kind of standing doesn't apply when it's strictly violating-the-statute conflict preemption versus some other type of preemption, like if it's expressly preempted by the statute.

Donald Falk: I think it's going to be a line-drawing exercise and I don't have any idea who is going to win. Even if it's affirmed, I think they're not comfortable with what the 9th Circuit did with it and they want to make sure there are limits, enforceable limits, before this becomes the next big thing.

DJ: The court has granted two cases out of the 9th Circuit relating to the ability of consumers to sue corporations. The first, calendared for oral argument in the first sitting, is *CompuCredit Corp. v. Greenwood***, 10-948. That case deals with whether companies that help debtors repair their credit can require that their customers arbitrate claims brought under Credit Repair Organization Act, a federal law designed to protect consumers against deceptive practices by credit repair companies.**

Cardozo: One of the interesting aspects of this case is that most of the challenges to arbitration have been whether the state policy has been hostile to the federal policy in arbitration. One of the things since Concepcion *[AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011)] is there's been a concerted effort to find federal policies, because they are at least given equal dignity and it's a question of congressional intent. This is an example where the court is going to lay out the methodology for that equal-dignity analysis. This case, by pitting two federal interests against each other, is a very interesting next step from Concepcion.

Leyton: The trends from this past term and the ones before it suggest the court won't be very favorably inclined towards claims made by consumers, particularly class action claims by consumers. This court has been very friendly towards mandatory arbitration provisions and very unfriendly to class actions and access to the courts. But the 9th Circuit in the judgment below does make a good point that the statute at issue requires notification to consumers that you have a right to sue.

Gunasekaran: I think it will boil down to whether the Supreme Court is willing to look at the merits of the case as opposed to whether these people can bring this action at all. I happen to think the 9th Circuit opinion is very well reasoned; when they say right to sue, they mean right to sue, not right to arbitrate. And the language of the statute is very clear that this is what the statute means — [consumers] have an absolute right to sue and they cannot waive that right. But then [the court] can turn around and agree with the opposition, which says, "No, no, no — it's in the provision of the act dealing with what are your enumerated disclaimers and doesn't really deal with your right to sue."

Michael Tubach: We are the other side, our firm. It's an interesting case because the language itself says "right to sue," but it's pretty clear in context — particularly in light of the Federal Arbitration Act, which has such strong pro-arbitration policy in it, and that Congress knows about the FAA and the courts' interpretations of the FAA favoring arbitration — that when Congress passed this statute, it didn't say you can't have arbitration. Congress has done so at least seven or eight other times. In other contexts, Congress has specifically said we do not want these claims arbitrated. And the fact that they didn't here is pretty strong evidence that when they used the term "right to sue," what they're saying is you have the right to enforce these rights.

Heinke: It will be another one of these cases that comes down to congressional intent — what does the statutory language mean and how much are people going to read the language and be done with it, or do we get into legislative history, which tends to divide this court. It will be interesting to see how they deal with the word "sue" here.

Gunasekaran: Yes, in the Alice in Wonderland sense of the word, as the decision says, or in the real meaning of right to sue.

DJ: The second 9th Circuit case about the ability for consumers to sue has to do with a federal law prohibiting kickbacks or referral agreements between real estate agents and title insurance brokers. *First American Financial Corp. v. Edwards, 10-708,* **asks whether a homebuyer has standing to initiate a class action under the Real Estate Settlement Procedures Act alleging there was a prohibited referral agreement between agent and broker — regardless of whether the homebuyer was overcharged.**

Sungaila: I have a fondness for this one; I just filed an amicus in it yesterday. I watched the case for a long time thinking of the two questions presented. One was very specific under RESPA, and the other was much broader, which the court took, about Article III standing itself. The fact that the court didn't take the RESPA question makes me think this is going to be a big case. It's a sleeper and I think it's going to be important because there are so many areas in which Congress has supposedly given these rights of action in a whole

swath of subject areas. This decision could deeply affect all of them, in terms of being able to sue in federal court.

Tubach: This is a fascinating case — and not just because I'll be closing on a refinancing in two weeks. Unlike CompuCredit, which Congress can fix with a wave of its hand, this one goes much more deeply — whether the Constitution requires some kind of actual injury before you can bring a claim in court. The nice, clean presentation here gives the court a nice opportunity to answer that question. It's purely a matter of does Congress get to say you have been injured and you get to sue, regardless of what the Constitution says. I think the answer to that is probably going to be no.

Myles: It's a tough call. I think it implicates all sorts of impulses on the part of the justices, including how one feels about congressional exercises of power and striking down acts of Congress. That's an issue that I think makes it difficult to predict the outcome.

Falk: It's difficult to imagine that Congress was providing for situations like this, but Congress said what it said. The Supreme Court did not take the statutory construction question, which was presented in the petition, not even for constitutional avoidance purposes. Certainly somebody is very eager to get to the bottom of this, partly because of the repercussions. If Congress can do it, of course there's no reason the state can't do it, to say somebody has a right to be free of x-type of conduct in your field of vision and everybody gets to line up who has some distant connection to the actor, without any causal connection to the supposed bad conduct and injury.

Leyton: It does implicate some of those issues about what does Congress have to do, because the court has said in other contexts that Congress can create a procedural right, the violation of which is actionable for Article III purposes. What's not clear is how far does that extend and how far the court will go in this case in potentially restricting that notion. There are potential implications in the ERISA context, fair housing, fair debt collection, a lot of other consumer contexts — potentially environmental cases, as well — where the procedural-type right for conflict-free exercise of fiduciary duties or some other right that may not result in economic injury but has been held actionable.

Myles: It raises this philosophical question of what is injury, if you come at it very broadly. There's a natural law conception of what injury is and there's the statutory-administrative state that's created myriad different types of injury that have been recognized in the law, and how would a broad ruling impact that whole area of man-made law structure that we now have.

Tubach: Do we all agree that the court is not likely to defer much to Congress on its right to define an injury?

Myles: I don't agree on that at all. I think there'll be significant voices saying deference is appropriate. By definition, a lot of what Congress is doing is defining what constitutes injury. If you say Congress doesn't get some deference on that, I think you get into a difficult area — I don't know how you could contain that principal.

Tubach: I didn't mean would there be any voices saying there should be deference. I guess my question, more precisely, was do you think that majority is going to give any deference to Congress on the right to define injury. This court, at least the majority, seems unwilling to defer to anyone for anything.

DJ: In a case that could have serious implications for the entertainment industry, the court will again consider the FCC's indecency policy for broadcast television when it hears *FCC v. Fox Television Stations Inc, 10-1293.* **In 2009, the court upheld the FCC's "fleeting expletives" ban on prohibited words, but left it open to be challenged on other grounds. On remand, the 2nd Circuit found the indecency policy to be unconstitutionally vague.**

Leyton: It shows how slowly things move through the courts. One of the cases involves a 1992 episode of NYPD Blue.

Heinke: In one of the cases, the FCC was concerned about a woman's breast and buttocks being shown. Have you seen [the HBO series] Game of Thrones?

DJ: The difference there being broadcast versus cable.

Heinke: What's the difference? They're both coming into your house.

Falk: I think a lot of it will have to do with the critique of *Red Lion* [*Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367 (1969)] and the line of old cases that says the First Amendment doesn't really count in broadcast because it's scarce and it's like a regulated government utility. That's the underpinning for upholding all these policies. Over the last 10 years, the premises for those decisions are pretty much unsupportable. It doesn't mean there might not be another way to uphold the regulation, but this is all based on a concept of communication spectrum and a variety of other subjective factors that just don't exist anymore.

Rosen: The video games case from last term [*Brown v. Entertainment Merchants Association, 08-1448 (2011)*] showed deference to the First Amendment and not creating exceptions for kids. The whole justification for the fleeting expletives ban is you have to protect the sensibilities of kids and I think that may be going by the wayside.

Gunasekaran: How do you feel about that as a parent?

Rosen: Well, as a parent I'm not subject to the First Amendment.

Heinke: It's a dictatorship at home.

DJ: In November, the court will weigh if police need to get a warrant before placing a GPS tracking device on a person's car in *U.S. v. Jones, 10-1259***. The court added a question that was a central piece in Chief Judge Alex Kozinski's withering dissent in a 9th Circuit ruling that said warrants are not necessary for GPS tracking. That added question asks whether police need a warrant to go onto a person's private property to attach the device to a parked car.**

Gunasekaran: I found it a fascinating case because you have the police getting a warrant, but they don't act within the 10 days that they're supposed to. Then they go out on the 11th day and attach the GPS so it becomes a case where they've acted without a warrant.

Cardozo: No pun intended, it's really the rubber hitting the road on the Fourth Amendment in this case. There's the conventional wisdom — that I don't really agree with — that you don't bet against the government in a Fourth Amendment case. But the question they added, with the property aspect to this case, an originalist is going have a problem with that, that the government can place an object on your car and we're not going to call that a search or seizure. Anyone who goes back to the founding days is going to raise a question, given the historical linkage between the Fourth Amendment and property rights.

Tubach: We represent Mr. Jones in the case, so I'm biased in my outlook I'm sure, but our response to the search petition was, "You shouldn't take this case — you don't

need to — but if you, do you should take the second question too." The Supreme Court has already held that a short amount of surveillance using some sort of electronic assistance is fine, but a month is too long and there's a line there where it's going to start violating the Fourth Amendment — that's a harder argument to make. On the other hand, taking the second question, it's pretty much cut and dry that they invaded this person's property. Now, it's not a huge invasion, but it's an invasion and you can't get away from that fact.

Falk: If you can do this with a car, why not a belt? You've got a tracker on your coat and we're going to follow you until you change clothes. Why can't they do that? I think that's not going to be something the majority is fond of.

Tubach: A second and broader point about this jurisprudence is the Supreme Court having to define what a reasonable expectation of privacy is and where they go to decide that. There's a case back in 2000 called Bond v. US [529 U.S. 334], which had to do with the manipulation of a bag to try to determine its contents. The court said when a bus passenger decides to place a bag in an overhead bin, he expects other passengers to move it for one reason or another, but he does not expect other passengers or bus employees to feel the bag in an exploratory manner. That may be true or that may be false, but what I find most interesting is they're not looking to any sources outside of their own personal experience to decide what that means. How many people on the Supreme Court have actually ridden a bus in a while?

PARTICIPANTS

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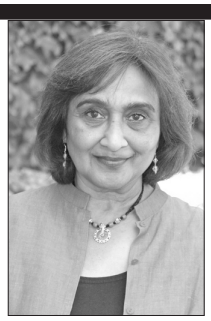

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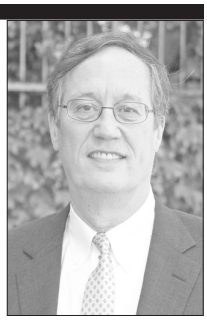

Rex S. Heinke co-chairs Akin Gump Strauss Hauer & Feld LLP's Supreme Court and appellate practice. Based in Los Angeles, he's argued over a hundred appeals and hundreds of case dispositive motions in federal and state courts throughout the country.

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